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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

DARYL ROBINSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0604-PC-309
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0412-FC-226713

February 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Daryl Robinson, pro se, appeals the summary denial of his pro se petition for post-conviction relief regarding his challenge to the effectiveness of counsel. Specifically, Robinson contends that the post-conviction court erred in denying his petition without a hearing on the merits of his claims. The State agrees. Thus, concluding that the summary denial of Robinson's petition for post-conviction relief was error, we reverse and remand for a hearing on the merits.

Facts and Procedural History

On December 16, 2004, the State filed an Information charging Robinson with possession of cocaine and possession of a firearm, a Class C felony; possession of a controlled substance, a Class D felony; carrying a handgun without a license, a Class C felony; possession of marijuana, a Class D felony; driving while suspended, a Class A misdemeanor; and resisting law enforcement, a Class A misdemeanor. The State later added a count alleging Robinson was an Habitual Substance Offender. Robinson moved to dismiss the habitual substance offender allegation claiming it was untimely filed and done so without good cause. The trial court denied this motion.

On August 10, 2005, Robinson entered into a guilty plea agreement with the State in which he pled guilty to possession of cocaine and possession of a firearm, a Class C felony, and to being an habitual substance offender. The trial court accepted his guilty plea and on November 23, 2005, the trial court sentenced Robinson to eight years with two years suspended and enhanced his sentence by two years for being an habitual substance offender.

Robinson did not seek a direct appeal.

On February 23, 2006, Robinson filed a petition for post-conviction review. As grounds for relief, Robinson claimed the habitual substance offender enhancement was untimely filed, ineffective assistance of counsel, and improper sentencing. On March 3, 2006, the post-conviction court summarily denied relief. Robinson now appeals.

Discussion and Decision

I. Standard of Review

Before discussing Robinson's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief.

Post-conviction procedures do not afford petitioners an opportunity for a "super appeal." Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post Conviction Rule 1(1). Petitioners bear the burden of establishing their grounds for relief by a preponderance of the evidence. Matheney, 688 N.E.2d at 890; see also P-C.R. 1(5). When petitioners appeal from a denial of post-conviction relief, they appeal a negative judgment. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998), reh'g denied, cert. denied, 528 U.S. 1083, 120 S.Ct. 806, 145 L.Ed.2d 679 (2000). Therefore, on appeal, a petitioner must show that the evidence, when taken as a whole, "leads unerringly and unmistakably to a conclusion opposite to that reached by the [post-conviction] court." Matheney, 688 N.E.2d at 890-891. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion. Emerson v. State, 695 N.E.2d 912, 915 (Ind. 1998), reh'g denied.

Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003) trans. denied.

II. Hearing

Robinson essentially argues that the post-conviction court erred by summarily denying his petition for post-conviction relief without a hearing. The State agrees remand is appropriate in this case to allow the parties to present evidence regarding Robinson's claim of ineffective assistance of counsel.

We note that a post-conviction court may summarily deny a petition upon motion of either party if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Post-Conviction Rule 1(4)(g).¹ Otherwise, a petition must be heard and a post-conviction court may receive affidavits or other evidence at its discretion. Ind. Post-Conviction Rule 1(5).² Regardless of whether a hearing is held, a post-conviction court is required to make specific findings of fact and conclusions of law on all issues presented. Ind. Post-Conviction Rule 1(6).

In construing these rules, our supreme court has determined that an evidentiary hearing is required when issues of fact are raised even in the unlikely event that the petitioner

¹Indiana Post-Conviction Rule 1(4)(g) states:

The court may grant a motion by either party for summary disposition of the petition when it appears from the pleading, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

²Indiana Post-Conviction Rule 1(5) provides in relevant part:

The petition shall be heard without a jury. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties, except as provided above. ... The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing.

will produce evidence sufficient to establish his claim. Bailey v. State, 447 N.E.2d 1088, 1090 (Ind. 1983). However, when the petition for post-conviction relief “conclusively demonstrates that the petitioner is entitled to no relief, a hearing on the matter is unnecessary and the petition may be denied without further proceedings.” Robinson v. State, 493 N.E.2d 765, 767 (Ind. 1986).

When a petitioner claims ineffective assistance of counsel, he must satisfy a two-pronged test, showing that: (1) his counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. Blanchard v. State, 802 N.E.2d 14, 34 (Ind. Ct. App. 2004). Counsel’s performance is presumed effective, however, and a defendant must offer strong and convincing evidence to overcome this presumption. Id.

Here, Robinson claimed in his petition for post-conviction relief that his trial counsel failed to properly assist him. Robinson’s claim is based on the advice given him by his attorney after the trial court denied his motion to dismiss the habitual substance offender allegation. The State agrees that because this claim is based on statements made outside the record, the post-conviction court should have allowed the parties to offer evidence relevant to the claim either by affidavit or live testimony. Allowing the parties an opportunity to present evidence on the claim will allow for a proper disposition of the claim by the post-conviction court and for an effective appellate review. Thus, remand is necessary to allow the parties to

present evidence regarding Robinson's claim of ineffective assistance of counsel.

III. Change of Venue

Robinson also challenges the post-conviction court's summary denial of his Motion For Change of Venue From the Judge. In his motion for change of judge, Robinson alleged bias and prejudice by the judge. However, he fails to provide a supporting affidavit stating the facts and reasons for his belief that such bias or prejudice exists in contravention of the rules for post-conviction remedies. Ind. Post-Conviction Rule 1(4)(b). Rather, Robinson states the post-conviction court "showed further prejudice and bias" by denying the post-conviction petition. Brief of Appellant at 7. Robinson does not claim an abuse of discretion in the denial of his motion for change of judge. We must agree with the State that Robinson has waived this issue by failing to provide coherent argument or adequate citation to authority. See Ind. Appellate Rule 46(A)(8)(a); Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) trans. denied.

IV. Pre-Trial Motions

Robinson challenges the trial court's decision to allow the State to amend the charging Information and attach the allegation of habitual substance offender "untimely with no show of good cause." Br. of Appellant at 7. However, as the State points out, because Robinson pled guilty, he may not now attack the propriety of the trial court's pre-trial ruling. See Ford v. State, 618 N.E.2d 36, 38 (Ind. Ct. App. 1993) trans. denied (defendant who pled guilty at trial waived his right to challenge certain pre-trial rulings for the first time at his hearing for post-conviction relief).

Conclusion

Concluding the post-conviction court erred in summarily denying Robinson's petition for post-conviction relief, we are compelled to reverse and remand this cause to the post-conviction court for a hearing on the merits of Robinson's petition.

Reversed and remanded.

BAKER, J., and DARDEN, J., concur.